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IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-1452

HOSPITAL BUILDING COMPANY,
Petitioner,

vs.

TRUSTEES OF THE REX HOSPITAL, a Corporation,
JOSEPH BARNES, GEORGE STOCKBRIDGE, and
RICHARD URQUHART, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR PETITIONER

Of Counsel
ALSTON, MILLER & GAINES
1200 C&S National Bank Building
Atlanta, Georgia 30303

JORDAN, MORRIS and HOKE
1414 Branch Banking & Trust
Company Building
Raleigh, North Carolina 27602

JOHN K. TRAIN, III
TIMOTHY S. PERRY
ROBERT W. MILLER
1200 C&S National Bank Building
Atlanta, Georgia 30303
(404) 588-0300

JOHN R. JORDAN, JR.
1414 Branch Banking & Trust
Company Building
Raleigh, North Carolina 27602
(919) 828-2501

Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals, sitting *en banc*, is reported at 511 F.2d 678 (4th Cir. 1975). (App. 52). The order of the Court of Appeals granting rehearing *en banc* and withdrawing the previous opinion of the panel is not reported. (App. 51). The opinion of the panel of the Court of Appeals affirming *per curiam* the order of the District Court is reported in 1974-1 Trade Cases ¶ 74,903. (App. 49). The opinion of the District Court (Civil No. 4048) is reported in 1973-1 Trade Cases ¶ 74,428. (App. 46).*

* All citations to the Single Appendix are denoted "(App. . . .)".

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). An opinion of a panel of the United States Court of Appeals for the Fourth Circuit in this case was first filed and entered on February 6, 1974 affirming *per curiam* the order of the District Court. Thereafter a petition for rehearing *en banc* was filed on February 20, 1974. On June 11, 1974, the petition for rehearing *en banc* was granted, and the opinion of the panel was withdrawn. The opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, affirming the order of the District Court over the dissent of Judges Winter, Butzner, and Field was entered on February 18, 1975. The Petition for Writ of Certiorari was filed on May 19, 1975 and granted on October 6, 1975. — U.S. —, 44 U.S.L.W. 3178.

QUESTIONS PRESENTED

This case presents the question of the scope of Congressional power exerted in the Sherman Act to prohibit (i) anti-competitive conduct in providing hospital services and (ii) attempted monopolization of hospital services. This question arises in the context of a nationwide network of financing hospital services through Medicare (federal health insurance for the aged and disabled), Medicaid (federal grants to states with medical assistance programs), and national private health insurance companies.

In particular, the questions presented are:

1. Is the impact on interstate commerce of a conspiracy to block expansion of a hospital so insubstantial that the hospital cannot, as a matter of law, state a claim for relief satisfying the "effect on commerce" test of jurisdiction under the Sherman Act where the following facts are alleged:

(a) The proposed expansion is a virtual tripling of the facility's capacity at a cost of $4,000,000 expected to be financed by one or more out-of-state lenders;

(b) The hospital in 1972, prior to the proposed expansion, purchased $112,846 of supplies and equipment, 80% of which were purchased pursuant to national contracts negotiated by the hospital's out-of-state parent corporation;

(c) The hospital purchased $36,000 of management services in 1972, prior to the proposed expansion, from its out-of-state parent corporation;

(d) Approximately 95% of the hospital's billings in 1972, prior to the proposed expansion, were made to sources of payment under the Medicare and Medicaid programs and to health insurance companies, many of which are located out-of-state; and

(e) The principal conspirators are the hospital's only two competitors in the market who seek to restrict output in order to maintain and fix prices, to allocate customers and submarkets, and to foreclose effective entry to the market by the hospital?

2. Is providing hospital services a purely local, intrastate activity, so that an anticompetitive conspiracy to restrain or attempting to monopolize such hospital services cannot, as a matter of law, be subject to a claim for relief satisfying the "in commerce" test of jurisdiction under the Sherman Act?

3. Did the District Court err in dismissing a Sherman Act Complaint on the pleadings, either for failure to state a claim or for lack of jurisdiction, without any discovery and without the submission of any evidence?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Constitution of the United States, Article I, Section 8, Clause 3 provides in relevant part:

> "The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States . . ."

2. The Sherman Act, Section 1 (15 U.S.C. § 1) provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

3. The Sherman Act, Section 2 (15 U.S.C. § 2) provides in relevant part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

4. The Clayton Act, Section 4 (15 U.S.C. § 15) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

5. The Clayton Act, Section 16 (15 U.S.C. § 26) provides in relevant part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . ."

6. 28 U.S.C. § 1337 provides:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

STATEMENT OF THE CASE

A. Nature of the Conspiracy Alleged.[1]

This is a civil antitrust action for treble damages of at least $2,400,000 and injunctive relief brought by petitioner Hospital Building Company ("HBC"), a North Carolina corporation.

HBC operates a proprietary (for profit) hospital ("Mary Elizabeth") in Raleigh, North Carolina.[2] (App. 10). There are

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[1] Unless otherwise noted, the facts referred to in this portion of the Brief are taken from the Complaint, as amended. (App. 9).

[2] The geographic market involved is the Raleigh area, defined as Wake County, North Carolina. (App. 12).

only two other hospitals in the Raleigh area to compete with HBC in providing medical-surgical hospital services. (App. 36). One of these hospitals, Rex Hospital ("Rex"), is a private tax-exempt hospital operated by Defendant Trustees of Rex Hospital, a corporation. (App. 10). The other is a government hospital, Wake County Memorial Hospital ("Wake"), operated by the Wake County Hospital System, Inc. named as a co-conspirator but not as a defendant. (App. 11).

Rex and Wake, together with certain individual trustees, administrators, and agents named as defendants or co-conspirators (the "Raleigh Group"),[3] have conspired at least since 1970 to:

1. Restrict production of hospital services in the Raleigh area in order to hold prices at artificially high, non-competitive levels, (App. 15);

2. Allocate between themselves alone the customers of and submarkets for hospital services in the Raleigh area, (App. 15); and

3. Foreclose effective entry by HBC (and necessarily by others as well) into the Raleigh market. (App. 15, 19).

HBC alleges these activities violate Section 1 of the Sherman Act. (App. 14). In addition, HBC alleges Rex has attempted to monopolize a submarket of hospital services by non-public hospitals in the Raleigh area at least since 1970 in violation of Section 2 of the Sherman Act. (App. 26).

In the course of this conspiracy covering the entire Raleigh market for hospital services, the Raleigh Group conspired in

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[3] Defendant Barnes is an administrator of Rex. (App. 10). Defendant Urquhart is a trustee of Rex. (App. 11). Defendant Stockbridge is an agent of the conspiracy and Executive Secretary of the Health Planning Council for Central North Carolina. (App. 11, 17). Co-conspirator Andrews is the administrator and Executive Director of Wake. (App. 11). Co-conspirator Holley is a member and former chairman of the Health Planning Council for Central North Carolina. (App. 11).

particular to block the expansion, modernization, and relocation within the relevant market area of Mary Elizabeth, HBC's hospital. (App. 16-24). Though not expressly alleged, Mary Elizabeth was already a competitor in the Raleigh area when the first overt act of the conspiracy occurred[4] and at all times relevant to this action has had a capacity of 49 beds located in the same facility it currently occupies. In December, 1970 (over 10 months after the first overt act of the conspiracy),[5] Charter Medical Corporation ("Charter") purchased all of the stock of HBC with the intention of effectively entering the Raleigh market by expanding and relocating Mary Elizabeth from one place to another, both within the Raleigh area. (App. 34). Charter is a Delaware corporation with its principal place of business in Macon, Georgia.[6] As fairly implied from the allegation that the delay of this expansion and relocation "forestall[ed] the capacity of plaintiff to compete effectively in the Raleigh area" (App. 19), Charter was unable effectively to enter the Raleigh area market through operation of Mary Elizabeth absent such expansion.

The full force of the Raleigh Group's conspiracy became apparent to HBC upon its filing on November 4, 1971 (over 21 months after the first overt act of the conspiracy) with the Medical Care Commission[7] of an application for a certificate of need

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[4] In January, 1970, Rex and Wake caused the Joint Long Range Planning Committee to be formed. The report of this committee endorsed the Raleigh Group's design and has been used as a device to further that design. (App. 15-16).

[5] See footnote 4 above.

[6] At the time the Complaint was filed Charter owned, directly or indirectly, and operated nine other hospitals, located in Georgia, Louisiana, Virginia, and Nevada and managed hospitals in Georgia, Texas, Virginia, and Puerto Rico as well. (App. 34).

[7] The Medical Care Commission was the state body empowered to issue certificates of need for the construction of new hospital beds. Such a certificate of need was then required by Gen. Stat. § 90-291, N.C. Session Laws, Chapter 1164, ratified July 1, 1971. (App. 16).

requesting approval of an expansion of Mary Elizabeth from 49 to 140 beds. (App. 18).

The Medical Care Commission was expected to solicit and receive recommendations of local agencies on such applications which were not binding but were, as a practical matter, of great importance in the process. (App. 16). The Raleigh Group utilized the local agency for the Raleigh area, the Health Planning Council, as a tool of their conspiracy. (App. 16-18). The Raleigh Group, using its positions of responsibility on the Health Planning Council, caused it to carry out a charade of considering HBC's application by denying HBC any chance for a fair hearing before the Health Planning Council, and caused that Council to recommend to the Medical Care Commission that HBC's application to expand and relocate its facilities be denied. (App. 16-18).[8] This adverse recommendation was made despite the fact that the State of North Carolina projected a shortage of 409 medical-surgical hospital beds in the Raleigh area alone. (App. 19).[9]

Thereafter, the Raleigh Group attempted in bad faith to deny HBC access to the Medical Care Commission. (App. 18-21). After numerous delays prompted by the Raleigh Group's actions, the certificate of need was granted by the Medical Care Commission to HBC on June 30, 1972, almost seven months after its application was filed. (App. 21). At the same time it was opposing HBC's application, Rex filed an application on its own behalf to expand by 109 beds. (App. 22). In sharp contrast to the delays encountered by HBC, Rex's application (filed May 4, 1972) received expedited treatment by the Health Planning Council and the Medical Care Commission, and was granted on July 20, 1972, less than three months after the filing of its application. (App. 22).

[8] HBC contends that these activities go far beyond the permissible area defined by this Court in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), but this issue is not now presented for decision.

[9] HBC sought to expand its capacity by 91 additional beds. (App. 19).

To this date, neither HBC nor Rex has begun construction of this new capacity.[10] HBC alleged that, absent the Raleigh Group's conspiracy, it would have begun construction of the new Mary Elizabeth on or before March 1, 1972. (App. 26). Soon after HBC was granted the certificate of need, however, the Raleigh Group caused the Health Planning Council on July 28, 1972 to file in bad faith an appeal seeking a reversal of that grant. (App. 23).[11] This baseless appeal, further delaying construction of the new Mary Elizabeth, was ultimately dismissed by consent on February 6, 1973 after the decision of the North Carolina Supreme Court that the certificate of need statute violated the constitution of North Carolina.[12] By that time, however, the damage to HBC as a result of these calculated delays was substantial. The commitment of financing for the new expansion expired by its own terms, and the change in national economic conditions that took place during and after the period of delay has hampered efforts to structure alternative financing. In addition, HBC still faces an entrenched, anticompetitive conspiracy of its only two competitors in the relevant market, a conspiracy which HBC has alleged the Raleigh Group will not abandon unless compelled to do so by court order. (App. 22,

[10] Some statements of fact made in this paragraph are not alleged in the Complaint, in part because the events described occurred after the filing of the Complaint.

[11] Respondents are correct that "[n]either the respondents nor any other person sought or obtained a stay of the Medical Care Commission's order granting petitioner's 'Certificate of Need' . . ." (Brief for Respondents in Opposition, p. 4) but they fail to mention this baseless appeal.

[12] *In Re Certificate of Need for Aston Park Hospital, Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973). The instant action was filed October 10, 1972 (App. 9), over three months before the *Aston Park* decision (January 26, 1973).

23). Nevertheless, despite these serious handicaps, HBC fully intends to press its expansion of Mary Elizabeth. HBC has selected and acquired the site for the new hospital at a cost of approximately $800,000 and is actively seeking the financing necessary to begin construction. In addition, HBC has retained architects to complete design of the facility, has submitted the architectural drawings to the necessary government authorities for approval, and has received comments back from such authorities, all at a cost exceeding $100,000. Certainly the current success of the Raleigh Group's conspiracy in crippling HBC's efforts effectively to enter the Raleigh area should not shield the Raleigh Group from the dictates of the Sherman Act.

B. Facts Underlying Sherman Act Jurisdiction.

Looking first at the conspiracy's impact on HBC itself as distinguished from the impact on the Raleigh market as a whole, HBC alleged the following facts:

1. HBC, as well as Rex and Wake, receive payment for hospital services from out-of-state. HBC's charges for such services in 1972 were made to the following sources:

(a) Medicare 36.3%,

(b) Medicaid 2.1%,

(c) Private insurance programs 54.1%, and

(d) Direct to patient 5.5%. (App. 36).[13]

2. HBC purchases substantial amounts of goods and supplies from out-of-state vendors, 80% of which are purchased pursuant to contracts negotiated by its out-of-state

[13] As noted by Judge Winter in dissent below, "although not alleged, it may be inferred that if the hospital were expanded fees paid by out-of-state providers would increase substantially." (App. 69).

parent, Charter. In 1972 HBC purchased $112,846 of supplies (excluding food and kitchen supplies and including pharmacy purchases of $33,000). These purchases would increase substantially after expansion of Mary Elizabeth. (App. 35).

3. HBC purchases management services from its out-of-state parent, Charter. The fee, which is based on gross revenues, was $36,000 in 1972 and would increase substantially after expansion of Mary Elizabeth. (App. 35).

4. A substantial number of out-of-state patients seek hospital services in the Raleigh area. HBC competes with Rex and Wake to serve these persons. (App. 36).

5. The proposed expansion is a virtual tripling of the hospital's capacity at a cost of $4,000,000 to be financed by one or more out-of-state lenders (This cost estimate is based on the circumstances existing at the time the Complaint was filed. In the intervening three years costs have increased substantially). (App. 37).

Looking at the conspiracy's impact on the Raleigh market as a whole, HBC alleged the following:

"In its operation of Mary Elizabeth Hospital, Hospital Building Company is doing business in interstate commerce. The combination and conspiracy complained of herein has a substantial and direct effect on interstate commerce." (App. 37).

Certain obvious effects on the Raleigh market as a whole follow logically from the scope of the conspiracy alleged:

1. Restriction of production impedes the natural flow of supplies in interstate commerce to the market and limits the flow of payments under Medicare, Medicaid, and from out-of-state health insurers to the market.

2. Allocation of customers and submarkets diverts the natural flow of interstate commerce in supplies and payments from one hospital to other hospitals.

3. Foreclosure of effective entry stifles the natural flow of capital and other resources into the market.

Since HBC has knowledge primarily of actions with an immediate impact on it and has not had the benefit of discovery procedures to broaden its knowledge of the other actions of the conspiracy, most of the overt acts it alleges have a particular impact on HBC and its proposed expansion of Mary Elizabeth. The scope of the conspiracy alleged and the impact of that conspiracy, however, are not limited to HBC alone. In essence, the Raleigh Group has, to this point, successfully conspired since at least 1970 to keep the Raleigh area a two-hospital market (Rex and Wake) with HBC being a small and ineffective competitor whose efforts to compete are thwarted. As alleged, Rex and Wake have allocated the Raleigh market between themselves, have joined together to close off that market to competition, capital, and initiative from out-of-state by Charter through HBC, and have restricted output to maintain prices at high, non-competitive levels. (App. 15).

C. **Proceedings in the District Court.**

Upon motion of the Defendants under Rule 12(b)(1) and (6), and without any discovery, the District Court dismissed the Complaint, as amended, on the pleadings. The District Court did not state whether the reason for dismissal was failure to state a claim or lack of jurisdiction. The action dismissed was brought under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26). Subject matter jurisdiction lay in the District Court under 28 U.S.C. § 1337.

The District Court held that the hospital business alleged is "strictly a local, intra-state business" and that despite HBC's

transactions in interstate commerce, the "conduct of the defendants complained of in this case directly affects only a local activity of the plaintiff, and only incidentally and insubstantially does it affect interstate commerce." (App. 48-49).

D. **Proceedings in the Court Below.**

Upon appeal by HBC, a panel of the United States Court of Appeals for the Fourth Circuit affirmed the order of the District Court *per curiam*. (App. 49). The Federation of American Hospitals, a trade association of approximately 500 investor-owned hospitals across the United States in 1974 and now having over 1,100 member hospitals filed an *amicus curiae* brief in support of HBC's position on appeal stating its conviction that the "Court's decision on these issues will ultimately affect all investor-owned hospitals in this country."

Upon petition by HBC for rehearing *en banc*, the Fourth Circuit granted rehearing *en banc* and withdrew the previous opinion of the panel. (App. 51). After oral argument, the Fourth Circuit, sitting *en banc*, affirmed the order of the District Court over the dissent of Judges Winter, Butzner, and Field.

The majority in the Court of Appeals below, speaking through Judge Craven, held that the District Court dismissed the Complaint on the pleadings for failure to state a claim. The majority below did note, however, that the better course would have been to convert the Defendants' motions to ones for summary judgment with at least limited discovery but did not remand the case with that instruction. (App. 54).

As to the merits, the majority below held that providing hospital services is, as a matter of law, a "purely local activity". (App. 56). Accordingly, an anticompetitive restraint of the provision of hospital services could not satisfy the "in commerce"

test of jurisdiction under the Sherman Act. To state a claim for relief, HBC would therefore need to allege a conspiracy having a substantial effect on interstate commerce. The majority below then held that the conspiracy alleged did not have a substantial effect on interstate commerce. As noted in the dissent (App. 68), the majority below approached the question of substantial effect in two ways: first, it analyzed the conspiracy's quantitative impact on interstate commerce, and second, it analyzed the qualitative importance of the conspiracy's anti-competitive power.

In determining the substantiality of the quantitative impact, the majority below stated that the intent of the Raleigh Group to direct its conspiracy only at intrastate commerce was relevant in determining the substantiality of the effect on interstate commerce. (App. 60). Further, instead of measuring the conspiracy's quantitative impact on the flow of goods in interstate commerce to HBC, the majority below looked only to the impact on the suppliers of such goods and services and to the impact on the market price of such goods and services. (App. 61).

In determining the qualitative importance of the conspiracy's anticompetitive power, the majority below distinguished *Burke v. Ford*, 389 U.S. 320 (1967), *United States v. Employing Plasterers Ass'n.*, 347 U.S. 186 (1954), and *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3rd Cir. 1973). The majority below asserted that the Complaint in this case failed sufficiently to allege "anticompetitive power—the danger Congress sought to guard against." (App. 64).

Judge Winter, dissenting in the Court of Appeals below, joined by Judges Butzner and Field, cited this Court's discussion of the breadth of Sherman Act jurisdiction in *Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 194 (1974) and argued that the proper test was "whether Congress could reach the alleged conduct under the commerce power." (App

67). Though the dissent agreed with the majority below that the "in commerce" test of jurisdiction was not met, it argued that the conspiracy alleged did have a substantial and direct effect on interstate commerce. The dissent argued that the majority below inappropriately "applies a test designed for determining the jurisdictional ambit of the Clayton and Robinson-Patman Acts" instead of the broader test articulated by this Court in its discussion of Sherman Act jurisdiction in *Copp Paving Company, Inc.* (App. 67-68).

With regard to the quantitative impact of the conspiracy on interstate commerce, the dissent concludes "[t]he allegations establish the suppression of an interstate cash flow that would be both substantial and continuing." (App. 69).

As to the qualitative importance of the anticompetitive power alleged, the dissent stated that to conclude the allegations here do not demonstrate "the kind of anticompetitive power which 'Congress sought to guard against' is merely to disbelieve the plaintiff's allegations". (App. 71). The dissent viewed the power to "foreclose or limit the entry of competition, capital, and initiative from out-of-state" into the Raleigh market as "substantial" anti-competitive power. (App. 71).

Finally, the dissent emphasized the special nature of the federal interest in the health area:

> "There is, furthermore, clear and significant federal interest in at least one of these connections—the interstate flow of medicare and medicaid payments, and more generally with the costs of medical care in Wake County. Actual or attempted monopolization of the local market could have a dramatic effect, not only to decrease the flow of hospital payments, but to increase the cost of hospital care in the Raleigh area as well. If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs

beyond the local area in which they are incurred. And this is so even if the overall market for hospital care in the Raleigh area is neither increased nor diminished, but only concentrated in the hands of the hospital defendants." (App. 72).

SUMMARY OF ARGUMENT

In enacting the Sherman Act, Congress exercised its full authority over interstate commerce under the Constitution. This case presents as its central issue whether this scope of Congressional power under the Constitution encompasses an anticompetitive conspiracy to restrain and attempting to monopolize the provision of hospital services in Raleigh, North Carolina. This issue arises in the context of a growing nationwide network of financing by the federal government through its Medicare and Medicaid programs and also by health insurance companies of the provision of these hospital services. The Raleigh Group's conspiracy to restrict production in order to maintain and fix prices for hospital services at high, anticompetitive levels, to allocate customers and submarkets, and to foreclose effective entry can only add to the spiralling, already astronomical costs of hospital care which have made that growing network of national financing essential.

I

The Raleigh Group's conspiracy substantially affects interstate commerce. HBC and hospitals in general engage in interstate transactions as an integral part of providing hospital services. These interstate transactions range from the acquisition of goods, supplies, and construction financing in interstate commerce to the receipt of payment for hospital services from the federal government under Medicare and Medicaid and from private health insurance companies. As this Court determined

in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), even a purely local conspiracy can substantially affect interstate commerce if the activities restrained are an integral part of interstate transactions. Unlike *Goldfarb* where the legal services restrained were merely ancillary to the sale of real property in interstate commerce, the provision of hospital services is the *essential core* of the interstate transactions in this case. A restraint of the essential core necessarily affects the whole range of these interstate transactions.

The substantiality of these clear effects on interstate commerce should not be discounted because they may have been in some sense unintended. Whether or not the conspiracy was purposely directed at interstate commerce is immaterial; it is the impact of the conspiracy, not the "interstate culpability" of the conspirators, which is relevant. The scope of Congressional power under the Constitution is not a function of the intent of the conspirators to injure interstate commerce but a function of the logical and therefore probable burden on interstate commerce as a result of the conspiracy. A conspiracy must take its victims' involvement in interstate transactions as it finds it and should be presumed to intend the logical consequences of its actions, particularly where there is no allegation of intent solely to affect intrastate commerce. In addition, just as no specific magnitude of the effect need be shown in order successfully to demonstrate a substantial effect, no specific impact on an interstate supplier or on a particular market price of supplies or services need be alleged. It is sufficient under the Sherman Act to show that the natural, unimpeded flow of interstate commerce is altered or diminished substantially by the conspiracy.

Apparently fearful that the increasing economic interdependence of all segments of the national economy will bring within the scope of Congressional power a new range of formerly "local" conduct, the majority below concluded that the "evil of

monopoly power" was the driving force behind the Sherman Act. (App. 63). In essence, the majority below restricted Congressional power to prohibit anticompetitive restraints by requiring a local conspiracy to attain monopoly power before any substantial effect on interstate commerce as a result of that conspiracy could be demonstrated. Yet, as noted in the dissent below, it is not merely the evil of monopoly power but the evil of improper attempts to achieve it which the Sherman Act proscribes. (App. 71-72). The concept of interstate commerce is not static, but adjusts to practical economic reality. The range of activities which Congressional power as fully exercised under the Constitution can reach is not frozen in the past but alters with changes in the nature of interstate commerce. Even if the new standard of anticompetitive power erected by the majority below is accepted, HBC has alleged a conspiracy to maintain a two-competitor market (Rex and Wake) with HBC as a small and ineffective competitor whose efforts to become an important factor in the market are thwarted by the conspiracy restraining and attempting to monopolize the relevant market. To hold such a conspiracy lacking in anticompetitive power is merely to disbelieve HBC's allegations.

II

In its operation of Mary Elizabeth, HBC is doing business in interstate commerce. The provision of hospital services by HBC, Rex, and Wake occurs in the flow of interstate commerce, defined by this Court as "the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 195 (1974). The practical economic continuity presented in this case begins with the purchase in interstate commerce of the goods and services necessary to provide hospital services and continues through the payment for these services by the federal

government under its Medicare and Medicaid programs and by private health insurance companies, all as ultimate purchasers of hospital services. This flow of interstate commerce resembles the interstate commerce in sales of real estate presented in *Goldfarb* where this Court emphasized the interstate financing of real estate purchases in finding such transaction frequently to be "interstate" in nature. The Raleigh Group's conspiracy restrains and attempts to monopolize an appreciable amount of interstate commerce. HBC therefore meets the requirements of the "in commerce" test of jurisdiction under the Sherman Act.

III

Without the submission of any evidence and over the objection of HBC, the District Court dismissed HBC's Complaint on the pleadings either for want of jurisdiction or failure to state a claim on which relief could be granted. HBC has not had the benefit of any discovery procedures in order for it to present all the available evidence on the interstate commerce issues. These interstate commerce issues present a question of subject matter jurisdiction, and particularly with regard to the issue of substantial effect on interstate commerce, a resolution of the question of subject matter jurisdiction is identical to a resolution of certain issues on the merits. Only in limited instances should a question of subject matter jurisdiction under the Sherman Act be resolved by summary proceedings, and even then, the proper form of summary procedure is summary judgment with its accompanying limited discovery, not dismissal on the pleadings with no submission of evidence whatsoever. Such a departure from appropriate procedure seriously prejudiced HBC's right to a fair hearing and endangers the viability of private actions as a means of enforcing the antitrust policy of the United States.

ARGUMENT

Introduction

This case presents a question of Congressional power under the Constitution. In *Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 194 (1974), this Court reaffirmed its prior declarations that in enacting Section 1 of the Sherman Act, Congress "wanted to go to the utmost extent of its Constitutional power . . ."[14] Since this Court has authoritatively resolved the question of Congressional intent to exert its full power in enacting Section 1 of the Sherman Act, the test of jurisdiction under the Sherman Act, however articulated, is one of Congressional power.[15] As a result, the decision below

[14] This reaffirmation is part of a discussion by this Court contrasting jurisdiction under the Sherman Act to jurisdiction under other antitrust laws and was not essential to the decision of the issues before the Court in that case:

> "The jurisdictional reach of § 1 thus is keyed directly to effects on interstate markets and the interstate flow of goods. Moreover, our cases have recognized that in enacting § 1 Congress 'wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements. . . .' *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 558 (1944). Consistently with this purpose and with the plain thrust of the statutory language, the Court has held that, however local its immediate object, a 'contract, combination . . . or conspiracy' nonetheless may constitute a restraint within the meaning of § 1 if it substantially and adversely affects interstate commerce. *E. g., Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948). 'If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' *United States v. Women's Sportswear Mfrs. Assn.*, 336 U.S. 460, 464 (1949)." *Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 194-195 (1974).

[15] This case does not also present questions of statutory interpretation, as did recent cases on the scope of jurisdiction under the Robinson-Patman Act (*Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186 (1974)) and under the Clayton Act (*United States v. American Building Maintenance Industries*, — U.S. —, 43 U.S.L.W. 4838 (June 24, 1975)).

constitutes a determination that Congress is without power under the commerce clause to reach the alleged conduct.

The majority below articulated the traditional formula for determining jurisdiction under the Sherman Act as follows:

> "An antitrust plaintiff may establish the necessary connection with interstate commerce in either of two ways: by demonstrating that the alleged anticompetitive conduct occurred *in* interstate commerce, or by showing that the conduct, though wholly intrastate, had a substantial *effect on* interstate commerce." (Emphasis in the original) (App. 55-56).[16]

HBC contends it has satisfied both these traditional tests of jurisdiction. The argument in this Brief with regard to the "effect on commerce" test precedes that with regard to the "in commerce" test.

I. The Raleigh Group's Conspiracy Substantially Affects Interstate Commerce.

There is no question that HBC and hospitals in general regularly engage in transactions in interstate commerce. The majority below itself stated the following as a premise it accepted:

> ". . . (1) Mary Elizabeth, and hospitals in general, have become substantially enmeshed in the interstate commerce network through their use of interstate communications facilities, their subjection to extensive federal regulation, their purchases of materials and services from out-of-state, their treatment of patients from other states, and their financial

[16] Judge Winter in dissent below observes, however, that the majority fails to follow the traditional test and instead "as its addendum demonstrates, applies a test designed for determining the jurisdictional ambit of the Clayton and Robinson-Patman Acts." (App. 67-68).

arrangements with national health insurers and government welfare programs . . ." (App. 56-57).[17]

Nor is there any question that the activities of the Raleigh Group affect these interstate transactions to some degree.[18]

In considering a similar case, the United States Court of Appeals for the Third Circuit recently commented that:

> ". . . precedent in this area is unlikely to dictate the outcome in any given case. Instead, it is more likely to communicate a general sense as to how much of an impact local activities must have upon interstate commerce before they confer jurisdiction." *Doctors Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48, 51 (3rd Cir. 1973).

Bearing this in mind, the following discussion focuses on the relevant decisions of this Court and other courts by first exploring the nature of the interstate transactions in question and then discussing the impact, as a practical matter, of the Raleigh Group's conspiracy on those transactions.[19]

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[17] The District Court below as well conceded this activity in interstate commerce:

> "These various activities show unmistakably that the plaintiff engages in transactions in interstate commerce, but it does so only incidentally to the conduct of its principal business which is that of operating a hospital in Raleigh, North Carolina." (App. 48).

[18] Neither the majority below nor the District Court below determined that there was no impact whatsoever on interstate commerce arising from the Raleigh Group's conspiracy. The District Court held the effect to be incidental and insubstantial (App. 48) while the majority below considered the effect to be indirect, fortuitous, negligible and insufficient (App. 60, 61).

[19] For ". . . [i]t is in a practical sense that we must view an effect on interstate commerce, *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905); *Mandeville Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 233 (1948)." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 784 (1975).

A. HBC and hospitals in general regularly engage in interstate transactions as an integral part of the provision of hospital services.

HBC is a provider of hospital services, both in the generic sense and within the meaning of federal statute.[20] Its business is to assemble and maintain the sophisticated equipment and staff necessary to offer first-rate hospital care to the Raleigh area. It has two competitors—Defendant Rex is a private, tax-exempt hospital, and co-conspirator Wake is a government hospital. (App. 10, 11). Together they compete for paying patients in order to generate sufficient operating revenues to stay in business. (App. 12-13).[21]

Only a small portion of patients pay directly for hospital services.[22] Instead, most patients finance the purchase of hospital services through third-party payors such as health insurance companies and the federal government through Medicare and Medicaid.[23]

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[20] For the purpose of the Medicare program, a "provider of services" as defined in 42 U.S.C. § 1395x(u) includes a "hospital" as defined in 42 U.S.C. 1395x(e).

[21] Increasingly, tax-exempt hospitals like Rex also require third-party payment, and this trend has prompted the Internal Revenue Service to revise its standards for determining the "charitable" status of tax-exempt hospitals. The controversy arising from this change is presently before this Court in *Eastern Kentucky Welfare Rights Org. v. Simon* and its companion case. (Dkt. Nos. 74-1110 and 74-1124).

[22] In the case of HBC, only 5.5% of charges for hospital services are made directly to the patient. (App. 36).

[23] At HBC, almost 95% of charges for hospital services are made to such third-party payors. (App. 36). Over 36% of HBC's charges are made to the federal government under Medicare. (App. 36). Without the benefit of any discovery procedures, HBC is not aware of the actual level of charges under Medicare submitted by its two competitors, Rex and Wake, but alleged that many of the fees charged patients by Rex and Wake are paid "by insurance

The major role of third-party payors in financing what this Court has recognized as the ". . . already astronomical costs of hospitalization which bear so heavily on the resources of most Americans"[24] is understandable. As the United States Court of Appeals for the District of Columbia noted, hospital operating costs ". . . have soared in recent years as constant modernization of equipment and facilities is necessitated by the advances in medical science and technology."[25]

This relationship with health insurance companies and with the federal government's Medicare and Medicaid programs is an integral part of hospital business. Almost 95% of its revenue flows to HBC from these third-party payors. (App. 36).[26]

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companies and other providers located outside the State of North Carolina." (App. 36).

The federal expenditures, including administrative costs, under Medicare and Medicaid are indicated below:

	1972	1973	1974
Medicare	8,363,000,000	9,090,000,000	11,410,000,000
Medicaid	4,426,000,000	4,090,000,000	4,875,000,000

(Table No. 435; Statistical Abstract of the United States—1974, U.S. Department of Commerce). Not all of these expenditures are for the purchase of hospital services. Under the Medicare program, providers like HBC seek reimbursement for hospital services to eligible patients by submitting requests for reimbursement to a fiscal intermediary. The fiscal intermediary contracts with the Secretary of H.E.W. and the provider to perform general administrative functions pursuant to 42 U.S.C. § 1395h. Fiscal intermediaries receive funds from the federal government and disburse these funds to providers, all in accordance with federal statutes and regulations governing the Medicare program. 42 U.S.C. §§ 1395g-1395h.

[24] *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 265 (1974).

[25] *Eastern Kentucky Welfare Rights Org. v. Simon*, 506 F.2d 1278, 1288 (D.C. Cir. 1974), *cert. granted*, 421 U.S. 975 (1975).

[26] This regular flow of payments across state lines contrasts sharply with the "few, sporadic, and incidental" payments across state lines by a doctor-sponsored prepaid health care plan considered by this Court in *United States v. Oregon Medical Society*, 343 U.S. 326, 339 (1952).

HBC's provision of hospital services, including its capital expenditures to expand, is pervasively regulated by the federal government.[27] Viewing the provision of hospital services in this context as a purely local activity fundamentally misconceives the nature of the transactions at issue.[28]

This flow of payments in interstate commerce is only one part of the interstate transactions which are an integral part of the provision of hospital services. In order to provide hospital services, HBC purchased over $112,000 of equipment and supplies in 1972. These purchases ranged from drugs and laboratory equipment to specialized supplies and equipment for its radiology

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[27] An especially noteworthy aspect of the Medicare program with regard to the Raleigh Group's conspiracy is the fact that the $4,000,000 expansion of Mary Elizabeth which the Raleigh Group seeks to bar as part of its overall scheme must be approved under federal regulations if HBC is to be eligible for reimbursement of these capital expenditures under the Medicare program. One element of the reimbursement formula under Medicare (which is generally designed to measure the reasonable cost of hospital services) takes into account the cost of capital expenditures such as the proposed $4,000,000 expansion of Mary Elizabeth. Unless the capital expenditure has been approved through a procedure set up by a federal statute to prevent wasteful duplication of facilities, the provider will receive no payment under Medicare for that portion of its costs. 42 U.S.C. § 1320(a)-1.

[28] The United States Department of Justice has echoed HBC's arguments in alleging trade or commerce in *United States v. The American Society of Anesthesiologists, Inc.*, Civil No. 75-4640, United States District Court, Southern District of New York (filed September 22, 1975). That complaint, alleging a price-fixing conspiracy by The American Society of Anesthesiologists, Inc. ("ASA"), singles out the flow of payments to anesthesiologists from the federal government and health insurance carriers as well as the purchases of supplies as the basis of jurisdiction under the Sherman Act. The full complaint is attached to this Brief as Appendix A. The position of HBC is also consistent with the decision of the Seventh Circuit in *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256 (7th Cir. 1975), *cert. denied sub nom Modern Asphalt Paving and Construction Co.*, — U.S. —, 44 U.S.L.W. 3205 (October 6, 1975) where the fact that a sewer project was financed in part by the United States Department of Housing and Urban Development was viewed as a significant factor in finding jurisdiction under the Sherman Act.

and electrocardiology operations. (App. 35).[29] Approximately 80% of the supplies were purchased pursuant to national contracts negotiated by HBC's out-of-state parent, Charter. (App. 35). In addition, HBC purchased management services in interstate commerce from Charter at a cost of $36,000 in 1972. (App. 35). These purchases of goods and supplies are not sporadic, nor are they a "one-shot" affair.[30] The volume of these transactions in interstate commerce is directly related to the volume of hospital services provided and would necessarily increase substantially with the expansion of HBC. (App. 35).[31] In addition, HBC, Rex, and Wake compete to serve the substantial number of out-of-state patients who come to the Raleigh area for treatment. (App. 36).[32] Finally, the expansion, mod-

[29] Congress by exempting certain sales of supplies to non-profit hospitals from the provisions of the Robinson-Patman Act has recognized that the sale of supplies, including drugs, to hospitals often occurs in the flow of interstate commerce. 15 U.S.C. § 13c. The scope of this exemption is before this Court in *Abbott Laboratories, et al. v. Portland Retail Druggists Ass'n., Inc.* (No. 74-1274).

[30] This regular and continuing set of interstate transactions differs markedly from the initial outfitting of a single bowling alley requiring a "one-shot" purchase of supplies in interstate commerce which has been held not to affect interstate commerce substantially. *Lieberthal v. North County Lanes, Inc.*, 332 F.2d 269 (2nd Cir. 1964). The Court there (at p. 272) distinguished the facts before it from the "continuous flow of plastering materials" described by this Court in *United States v. Employing Plasterers Ass'n.*, 347 U.S. 186 (1954) where this Court held the local conspiracy alleged substantially affected interstate commerce.

[31] HBC's allegations here are in contrast to those made in *Wolf v. Jane Phillips Episcopal-Memorial Medical Center*, 513 F.2d 684 (10th Cir. 1975). There the plaintiff doctor did not allege any impact on his purchases of supplies for his private practice as a result of an alleged conspiracy to exclude him from a staff position with defendant hospital, nor were there apparently any allegations as to the amount of supplies he purchased.

[32] In a number of cases finding no jurisdiction under the Sherman Act involving doctors or hospitals, the only allegation of trade or commerce considered by the court was that of an unspecified and apparently limited number of such out-of-state patients. HBC clearly does not rely on this allegation alone to justify jurisdiction in this

ernization, and relocation of Mary Elizabeth, costing more than $4,000,000, will be financed by loans with one or more out-of-state lenders, so that payments to secure building supplies and to repay the financing will cross state lines. (App. 37).

All of these interstate transactions are an integral part of the provision of hospital services. Together they constitute a substantial and continuing flow of money, goods, and services in interstate commerce which Judge Winter in dissent below described as follows:

> "Money thus flows from Blue Cross, private insurers, and the federal government to the hospital and thence to out-of-state suppliers, managers, and financiers." (App. 72).

Thus, even assuming the provision of hospital services by HBC, Rex, and Wake is a wholly-local, intrastate activity, the provision of these hospital services is an integral part of interstate transactions.

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), this Court held that a conspiracy to restrain a wholly local, intrastate service could nevertheless substantially affect interstate commerce if the local service is an *integral part* of inter-

case. *See*: *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167 (8th Cir. 1959) (the only jurisdictional allegation considered was one of an unspecified number of out-of-state patients; an allegation concerning an effect on purchases of supplies was not considered because no connection between these purchases and the conspiracy was alleged); *Spears Free Clinic and Hospital for Poor Children v. Cleere*, 197 F.2d 125 (10th Cir. 1952) (claim that hospital was "in" interstate commerce solely because of an unspecified and apparently limited number of out-of-state patients); *Nankin Hospital v. Michigan Hospital Service*, 361 F. Supp. 1199 (E.D. Mich. 1973) (treatment of a single out-of-state patient in ten years); *Winters v. Kansas Hospital Service Ass'n., Inc.*, — F. Supp. — (Kan. 1974) 1975-1 Trade Cases ¶ 60,140 (approximately 1% of patients treated at defendant hospitals were from out-of-state).

state transactions. In determining whether the service is in fact an integral part of interstate transactions, this Court analyzed whether the service provided was in a practical sense necessary to the interstate transaction. Given the inseparability of the local service from the interstate transactions, and given the required volume of interstate transactions, this Court held a restraint of local services substantially affected interstate commerce.

The interstate transactions involved in *Goldfarb* are similar to some of the interstate transactions which are an integral part of providing hospital services. In *Goldfarb*, this Court highlighted the interstate financing of real estate transactions, particularly the involvement of out-of-state lenders and the role of instrumentalities of the federal government in guaranteeing that financing. These elements of financing were the interstate aspects of real estate transactions affected by conduct "which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states." (at page 784).

In the instant case, just as out-of-state lenders and the federal government finance the purchase of real property in *Goldfarb*, health insurance companies and the federal government through the Medicare and Medicaid programs finance the purchase of hospital services from HBC, Rex, and Wake. Moreover, the provision of hospital services is not merely *ancillary* to the interstate transactions, as were the legal services in *Goldfarb*. The provision of hospital services is the *core* of these interstate transactions. The Raleigh Group's conspiracy to restrict production of hospital services in order to maintain prices at artificially high levels, to foreclose effective entry to out-of-state capital and initiative, to allocate customers and submarkets, and its attempt to monopolize a submarket for hospital services affects the essential element triggering the whole gamut of interstate

transactions ranging from provider reimbursement to the purchase of goods and services.[33]

The provision of hospital services bears a greater resemblance to a taxi trip between stations to change trains than does the provision of legal services. The critical element of continuity highlighted by this Court in *Goldfarb* in applying that analogy from *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947) is clearly present here. On one side are the out-of-state health insurance companies and the federal government; on the other, the out-of-state providers of goods and services. The provision of hospital services is the essential link between and a necessary part of these two categories of interstate transactions. Without it, these interstate transactions would not occur.

As Judge Winter stated in dissent below:

> "Under all these circumstances, I think it myopic to maintain that the service itself is rendered locally. Local patient care may be the hub of hospital operation, but the spokes—financing, supplies, management, and fee payments—all have out-of-state implications. The hub cannot be braked without affecting the spokes." (App. 72-73).

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[33] The test applied in *Page v. Work*, 290 F. 2d 323, 330 (9th Cir. 1961) is not inconsistent with the approach taken in this Brief. In *Page*, the Court stated that "[t]he test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." The Raleigh Group's conspiracy clearly affects the interstate transactions which are an integral part of providing hospital services. As in *Page*, the question of the substantiality of that effect remains, and is discussed in the following section of this Brief. In *Page*, the Court found the effects alleged were either non-existent or insubstantial.

B. **The Raleigh group's conspiracy substantially affects the interstate transactions which are an integral part of the provision of hospital services by HBC, Rex, and Wake.**

Certain obvious effects on the interstate transactions of HBC, Rex, and Wake follow logically from the scope of the alleged conspiracy:

1. Restriction of production of hospital services impedes the natural flow of supplies and services in interstate commerce to the Raleigh market and particularly the substantially increased flow of supplies and services to an expanded HBC;

2. Restriction of production suppresses the flow of payments for hospital services from out-of-state health insurers and the federal government under Medicare and Medicaid;

3. Restriction of productive capacity (i.e. number of beds) in order to maintain and fix prices at artificial levels deprives consumers of the benefits of free competition;

4. Allocation of customers and submarkets diverts the natural flow of supplies and of out-of-state payments for services from one hospital to other hospitals;

5. Foreclosure of effective entry stifles the natural flow of capital and other resources into the market; and,

6. As Judge Winter noted in dissent below:

> "Actual or attempted monopolization of the local market could have a dramatic effect, not only to decrease the flow of hospital payments, but to increase the cost of hospital care in the Raleigh area as well. If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs beyond the local area in which they were incurred. And this is so even if the overall market for hospital care in the Raleigh area is neither increased nor diminished, but only concentrated in the hands of the hospital defendants." (App. 72).

As the dissent below states, the effects of the conspiracy on interstate commerce, taken as a whole, are substantial. (App. 69).

As this Court noted in *Goldfarb*, it is not necessary to allege or prove the specific magnitude of the effects:

> "The fact that there was no showing that home buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected. Otherwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved. *E.g., United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 310 (1956)." (421 U.S. 773, 785).

This approach is consistent with previous decisions of this Court in *Burke v. Ford*, 389 U.S. 320 (1967) (*per curiam*) and *United States v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954). Both cases held that an intrastate conspiracy affected interstate commerce substantially. In *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48, 53 (3rd Cir. 1973), the United States Court of Appeals for the Third Circuit described the central thrust of these two cases as follows:

> "There is no discussion of 'directness' or of the specific relationship between the interstate goods affected and the local market controlled. Nor is there even a concern with the specific magnitude of the impact on interstate commerce caused by the alleged conspiracy.

Instead, the Court in each case ends its inquiry when it has satisfied itself that the logical and therefore probable effect of the alleged act is to reduce the flow of goods in interstate commerce." (footnotes omitted).

Judge Winter in dissent below applied the reasoning of *Doctors, Inc.* to the facts of this case as follows:

"In *Doctors*, the named plaintiff purchased $233,430 in supplies from out-of-state suppliers in the test year. Although this figure does not seem to be of any greater magnitude than the projected flow alleged by the plaintiff here, the majority relies on the fact that Doctors' Hospital was typical of the approximately one hundred other hospitals in the area against all of which the conspiracy was directed, so that it could properly be inferred that interstate purchases of great magnitude were jeopardized. The distinction, however, is largely without difference. *Gulf Oil* reminds us that, in enacting § 1 of the Sherman Act, Congress was exercising to the *fullest extent* its constitutional power to restrain trusts and monopolies. Thus, it is not only the 'big' resultant restraint on interstate commerce that it outlawed; the 'little' resultant restraint on interstate commerce is outlawed too so long as a direct adverse effect on interstate commerce is demonstrated and that effect is not de minimis" (App. 70).[34]

[34] Significantly, the *de minimis* standard suggested by Judge Winter is echoed by the United States Court of Appeals for the Fifth Circuit in *St. Bernard General Hospital, Inc. v. Hospital Service Ass'n of New Orleans, Inc.*, 510 F. 2d 1121 (5th Cir. 1975). There, (after discussing its previous decision in *Lehrman v. Gulf Oil Corp.*, 464 F. 2d 26 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972) where it held the effects on interstate commerce of a local conspiracy were not "insignificant or insubstantial") the Fifth Circuit commented "[i]n other words, it was not *de minimis*." (at page 1125).

The majority below held that the conspiracy's effects on interstate commerce were insufficient to establish jurisdiction:

"The effect here seems to us the indirect and fortuitous consequence of the restraint of the intrastate Raleigh area hospital market, rather than the result of activity purposely directed toward interstate commerce. Although not controlling, this factor is relevant to the issue of substantiality. *See, e.g., Spears Free Clinic v. Cleere, supra*, 197 F. 2d at 127; *Marston v. Ann Arbor Property Managers (Management) Association*, 302 F. Supp. 1276, 1280 (E. D. Mich. 1969), *aff'd per curiam*, 422 F. 2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970)." (footnote omitted) (App. 60).

This determination, and in particular its inclusion of the purported intrastate intent of the conspiracy as a factor is in sharp contrast to, and conflicts with, the decisions of this Court and other Courts of Appeal.[35]

In *St. Bernard General Hospital, Inc. v. Hospital Service Ass'n of New Orleans, Inc.*, 510 F.2d 1121 (5th Cir. 1975) the Fifth Circuit held that the district court erred in dismissing for lack of jurisdiction a complaint alleging violations of the Sherman Act respecting the rendition of hospital services. The case was remanded to the district court for further proceedings on the question of jurisdiction as well as other questions. In analyzing the conspiracy's effects on commerce, the Fifth Circuit focused primarily on the effects the alleged con-

[35] Nowhere in the Complaint did HBC allege that the Raleigh Group purposely directed its conspiracy solely at intrastate commerce. Apparently the majority below implies such a limited intent from its reading of the objectives of the conspiracy. Aside from the inappropriateness of resolving such a question by summary proceedings, HBC submits that the objectives of the Raleigh Group and the activities undertaken to accomplish those objectives necessarily affected interstate commerce and that the logical implication is the Raleigh Group was aware of this effect and intended it.

spiracy could have on the flow of drugs and supplies in interstate commerce. The district court there had held, as did the district court in this case, "that the rendition of hospital services is a purely local activity" and that " '[w]hat is essentially an intrastate activity is not transformed into interstate commerce by reason of such purchases, and there exists no substantial effect on interstate commerce by the indirect effect of reducing prospective purchases of supplies in interstate commerce.' " The Fifth Circuit rejected this approach—the same taken by the Fourth Circuit majority in this case—saying that "we disagree with the court's purely-local-as-a-matter-of-law premise from which all conclusions, as well as the putative absence of a 'substantial effect' on interstate commerce followed." (at page 1124).[36] The Fifth Circuit's refusal to allow the question of substantial effect to be foreclosed by a holding that the services in question were purely local as a matter of law is in line with this Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), where the defendant had suggested to this Court that the proper test was whether the activity was essentially local. This Court rejected that standard as the "type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power." (at page 546).

In particular, the Fifth Circuit criticized the suggestion that the question of intrastate intent was relevant to the issue of substantial effect. The Fifth Circuit quoted from its previous decision in *Lehrman v. Gulf Oil Corp.*, 464 F. 2d 26, 36 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972), as follows:

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[36] The Fifth Circuit recognized "that the logic of *Hospital Building Co.* argues for a result contrary to that which we have reached." Nevertheless, the Fifth Circuit did not consider its decision to be in direct conflict with the decision in *Hospital Building Co.* (at page 1125). We submit, however, that the cases cannot be distinguished.

"The focus of the Act is to protect interstate trade from interferences of all degrees of subtlety. The concept of interstate commerce is a practical one. The interstate nerves of a local business can be deadened swiftly by a conspiracy the object of which happens to be the intrastate aspect of a plaintiff's business. We see no reason why the federal courts should confine themselves to protecting against interferences with interstate commerce which, quite fortuitously, turn out to have motivated the actions of a defendant. It is the effect on commerce that determines federal jurisdiction under the Sherman Act and not any notion of the 'interstate culpability' of those who engage in anticompetitive practices. No matter how intrastate the objects of anticompetitive conspirators, they must take their victims' involvement in interstate commerce as they find them." (at page 1124).

The approach taken by the Fifth Circuit is a sound one. The reach of Congressional power under the commerce clause should not be determined by the intent of conspirators to affect interstate commerce. Instead the focus should be on the *impact* of the conspiracy and thus on the actual burden on interstate commerce arising from the conspiracy. In determining the logical and therefore probable effect on interstate commerce of an anticompetitive conspiracy, it is appropriate to determine the potential scope of the conspiracy by ascertaining the objectives of the conspirators Once the objectives are determined and their probable impact on interstate commerce measured, however, it is inappropriate to discount that impact because it was in some sense unintended. Discounting an objective effect on interstate commerce because of the subjective intent of the conspirators makes the reach of Congress under the commerce clause a function of "interstate culpability" and introduces into the jurisdictional inquiry serious questions of proof. Certainly no intent factor is relevant in applying the "in commerce" test of Congressional power exerted in the Sherman Act. Just as no

specific magnitude of the effect need be alleged or proved, there should be no requirement that the effects alleged and proved be the result of conduct "purposely directed toward interestate commerce".

In determining that the substantiality of an effect on interstate commerce was lessened or eliminated by the fact the conspiracy was not "purposely directed toward interstate commerce" (App. 60), the majority below cited *Spears Free Clinic v. Cleere*, 197 F. 2d 125, 127 (10th Cir. 1952). That decision's reliance on intrastate intent was persuasively attacked by the Third Circuit in *Doctors, Inc.* as follows:

> ". . . the opinion even when it was written placed primary reliance on a series of cases that were no longer valid. These cases looked to the intent of the conspiracy alleged in order to determine whether the purported effects on interstate commerce conferred jurisdiction. If the aim of the conspiracy was to obstruct interstate commerce, it was said to have a 'direct' effect and jurisdiction was present. If the goal was otherwise, the effect was termed 'indirect' and there was no jurisdiction. This 'direct-indirect' test had been abandoned by the Supreme Court in the early 1940's. As a result, the reasoning of the opinion rested on flawed grounds even when it was issued in 1952." (at page 52).

The Third Circuit thus recognized that this Court long ago limited whatever force its previous cases considering intrastate intent material to the issue of jurisdiction under the Sherman Act may have had:

> "It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce. The cases relied upon by respondents fall within this category. All of them involved the application of the Anti-Trust laws to combinations of businessmen or workers in labor disputes, and not to interstate commercial transactions." *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 297 (1945) (footnotes omitted).

In *Goldfarb*, this Court neither considered nor discussed the intent of the conspiracy to affect interstate transactions in real estate. As the majority for the Fourth Circuit had noted in its opinion below in *Goldfarb* "[t]here is, of course, no allegation that the attorneys conspired for the express purpose of restraining the trade or commerce of those engaged in the real estate industry." (497 F. 2d 1, 15). Thus, this Court in *Goldfarb* held that a local conspiracy with apparently local intent could nevertheless substantially affect interstate commerce.

After first discounting the impact on interstate commerce as a result of the presumed intrastate intent of the Raleigh Group's conspiracy, the majority below failed to assess the substantiality of that impact on the flow of interstate commerce but instead mistakenly measured the substantiality of that impact on the interstate suppliers of goods and services themselves and on the market price of the interstate goods and services.[37] In the process, the majority below also considered the impact growing out of only one phase of the conspiracy, the delay of Mary Elizabeth's expansion, instead of the impact of the entire conspiracy to restrict production, allocate customers, and foreclose effective entry.

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[37] "Moreover, when the various economic consequences are sorted out and considered in the perspective of their respective markets, it is obvious that none of them could have more than negligible impact: no source of supply or insurance company or lending institution can be expected to go under if Mary Elizabeth doesn't expand, and no market price likely will be affected." (footnotes omitted) (App. 60-61).

It will be rare indeed for a conspiracy occurring wholly intrastate to threaten the economic viability of some national supplier of goods and services. If this were the test of substantial effect, the conspiracies before this Court in *Goldfarb*, *Employing Plasterers*, and *Burke v. Ford* could not have passed muster. Such a standard effectively shields local conspiracies not occurring in interstate commerce from the reach of Congressional power exercised under the Sherman Act. Instead, the inquiry should focus on the impact the conspiracy has on the flow of goods and services in interstate commerce. If that flow is "reduced or altered" or "diminished" to a substantial degree, the conspiracy comes within the reach of Congressional power.[38] Just as no specific magnitude of the effect need be shown, no specific impact on a market price or on a supplier should be required.

Stating its dissatisfaction with its own analysis, the majority below attempted to construct a rational framework for resolving questions of substantial effect based upon a notion of "anti-competitive power." (App. 62, 64).[39] Apparently fearing that

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[38] The Fifth Circuit in *St. Bernard General Hospital, Inc. v. Hospital Service Ass'n of New Orleans, Inc.*, 510 F. 2d 1121, 1125 (5th Cir. 1975) reaffirmed its prior statement that "the requisite effect is nonetheless accomplished by 'a reduced or altered flow of goods into the State . . . from without the state.' " The Ninth Circuit in *Rasmussen v. American Dairy Association*, 472 F. 2d 517, 525 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973) noted that the conspiracy alleged there would diminish the flow of ingredients in interstate commerce and held the conspiracy subject to the Sherman Act.

[39] The majority below is not alone in expressing impatience with verbal formulae as a guide to resolving jurisdictional questions under the Sherman Act. Catchwords provide little guidance to businessmen or judges in resolving these issues. The Third Circuit for instance noted with regard to the effect on commerce test:

> "When courts do speak in terms of a test, the formulations used are, of necessity, so broad and generalized that instead of providing a guide to the solution of the problem they do no more than restate the issue." *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F. 2d 48, 51 (3rd Cir. 1973).

See also Justice Jackson's comment that "the term 'direct' [as applied to effects on commerce] was used for the purpose of stating, rather than of reaching, a result . . ." *Wickard v. Filburn*, 317 U.S. 111, 122-123 (1942).

the increasing "inter-dependence of all segments of our national economy" would bring within the scope of the Sherman Act a new and ever-expanding range of local conduct, the majority below focused on the "evil of monopoly power" as the driving force behind the Sherman Act. (App. 62, 63). In essence, the majority below requires that a local conspiracy must attain monopoly power in the local market before a victim can successfully demonstrate a substantial effect on interstate commerce for purposes of jurisdiction under the Sherman Act. Yet as Judge Winter in dissent below observes:

> "In the Sherman Act, not only the 'evil of monopoly power', but the evil of improper attempts to achieve it are condemned." (App. 71-72).

Unreasonable restraints under Section 1 of the Sherman Act can occur long before monopoly power is established or even sought in violation of Section 2. Whatever limits there should be to a possible expansion of the range of activities subject to the Sherman Act as an outgrowth of increasing economic interdependence, a standard requiring monopoly power in a local market in order for a conspiracy substantially to affect interstate commerce is far too restrictive.

Even if the test applied by the majority below were accepted, however, HBC has clearly alleged the kind of anticompetitive power in the local market which the majority requires. Not only has HBC alleged a conspiracy by its only two competitors to restrict production in order to maintain and fix prices at an artificial level, to allocate customers, and to foreclose effective entry, HBC also alleged an attempt by Rex to monopolize a

two-competitor submarket (Rex and HBC) for hospital services. As detailed above at page 28 of this Brief, the Raleigh Group's conspiracy extended beyond attempts merely to delay the expansion of Mary Elizabeth. Judge Winter noted in dissent below:

> "In essence the plaintiffs allege that a local conspiracy was able to forestall out-of-state entry into the local hospital market. If by means of conspiracy and harassment those who hold a local market can foreclose or limit the entry of competition, capital, and initiative from out-of-state, then it seems to me that the federal interest in interstate commerce is directly involved. To conclude, as the majority does, that the plaintiffs here do not allege the kind of anticompetitive power which 'Congress sought to guard against' is merely to disbelieve the plaintiff's allegations." (App. 71).

In a practical sense, the Raleigh Group's conspiracy affects interstate commerce in a substantial way.

II. The Raleigh Group's Anticompetitive Conduct Occurred in Interstate Commerce.

In its operation of Mary Elizabeth, HBC is doing business in interstate commerce. (App. 37). As this Court has stated with regard to the "in commerce" aspect of the Clayton Act:

> "To be engaged 'in commerce' within the meaning of § 7, a corporation must itself be directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce." *United States v. American Building Maintenance Industries*, — U.S. —, 43 U.S.L.W. 4838, 4842 (June 24, 1975).

As already discussed at page 21 of this Brief, HBC purchases goods and services in interstate commerce. In addition, the provision of hospital services itself occurs in the flow of interstate commerce which this Court has defined as "the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 195 (1974). In the instant case, just as out-of-state lenders and the federal government financed a significant portion of the purchases of real property in *Goldfarb*, health insurance companies and the federal government through Medicare and Medicaid finance a significant portion of the purchases of hospital services in the Raleigh market. Emphasizing the interstate financing of real estate purchases in *Goldfarb*, this Court held such purchases frequently to be "interstate transactions":

> "As the District Court found, 'a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia,' and 'significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia.' Thus in this class action the transactions which create the need for the particular legal services in question frequently are interstate transactions." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783 (1975) (footnotes omitted).

As the decision of this Court in *Goldfarb* recognizes, the concept of interstate commerce is not static but adjusts to the reality of the market place. *Swift and Co. v. United States*, 196 U.S. 375 (1905). In economic reality, the ultimate purchasers of hospital services today, as clearly shown in this case, are (i) private health insurance companies and (ii) the federal government under its Medicare and Medicaid programs. The days when an individual receives from and pays the provider for hospital services out of his own pocket are over. The flow of

interstate commerce begins with the purchase in interstate commerce of the goods and services necessary to provide hospital services and continues through the payment for these services by such ultimate purchasers. This practical economic continuity constitutes a flow of interstate commerce.

The majority below, misconceiving the nature of the transactions in question, held:

> "The provision of hospital services has consistently been held to be a purely local activity. *Elizabeth Hospital, Inc. v. Richardson*, 269 F. 2d 167, 170 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); *Spears Free Clinic v. Cleere*, 197 F. 2d 125, 126 (10th Cir. 1952)." (App. 56).

In so holding the majority below relied on two decisions in which the only allegation considered by either court supporting jurisdiction related to an unspecified number of out-of-state patients which used or might use the hospital in question. The meager allegations regarding jurisdiction considered by the Courts of Appeal in both *Elizabeth* and *Spears* severely restrict their applicability here where HBC alleged numerous other facts showing its place in the flow of interstate commerce. In addition, the majority below failed to consider that both *Elizabeth* and *Spears* were decided before the advent of federal financing and regulation of hospital services under Medicare and Medicaid and the expansion of health insurance companies.[40]

In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), this Court faced a similar issue. The business of insurance had not been viewed previously as "commerce". This Court, in a landmark decision, acknowledged the vital importance of insurance to each citizen and the growth of a nationwide network in insurance which had developed as a practical economic matter over the years. This Court held the business of insurance to be "commerce" within the meaning of the Sherman Act and subject to jurisdiction under the Sherman Act because it was in the flow of interstate commerce. In explaining this decision, this Court stated:

> "Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts . . . The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state." (pp. 541-542).

It is precisely this inter-relationship between the cost of hospital services rendered in local markets such as the Raleigh area and both (i) the premiums paid by policyholders of private health insurance companies and (ii) the expenditures of the federal government under Medicare and Medicaid to which Judge Winter, dissenting below, referred as follows:

> "If hospital care costs are increased, insurance costs will also increase, and federal and out-of-state providers will spread these increased costs beyond the local area in which they are incurred." (App. 72).

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[40] As the instant case makes clear, it will be difficult for hospitals seeking effectively to enter or expand within a market to meet the jurisdictional requirements under the "effect on commerce" test as prescribed by the Fourth Circuit. Consequently, the federal government as the ultimate purchaser of a vast amount of these services will be virtually unprotected by the Sherman Act from conspiracies to foreclosure effective entry and to monopolize such markets.

It is important that this Court limit *Elizabeth* and *Spears* to their own economic era and their own facts in order to adjust the concept of interstate commerce to meet the new circumstances in the market for hospital services as presented in this case.

Instead of following *Spears* and *Elizabeth*, the majority below should have adopted the view of the "in commerce" test stated by the United States Court of Appeals for the Ninth Circuit in *Rasmussen v. American Dairy Association*, 472 F. 2d 517 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973):

> ". . . [T]he power of Congress over commerce among the states is not a 'technical legal conception,' divorced from economic reality. *See United States v. South-Eastern Underwriters Ass'n, supra*, 322 U.S. at 547, 64 S. Ct. at 1170. . . . As Justice Cardozo noted in his dissent in *Carter v. Carter Coal Co.*, 298 U.S. 238, 328, 56 S.Ct. 855, 880, 80 L.Ed. 1160 (1936), the words and phrases used to define the commerce power must be interpreted 'with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that evokes it.' Whether the requisite 'substantial economic effect' or 'substantial relation to the national interest' is present or absent is a practical, case-by-case economic judgment, not a conclusion derived from application of abstract or mechanistic formulae." (footnotes omitted) (at p. 523).

The decision of the majority below in holding the provision of hospital services to be purely local, intrastate commerce is inconsistent with the decisions of this Court and with the approach articulated in *Rasmussen*. There is an appreciable amount of interstate commerce involved. The Raleigh Group's conspiracy restrained that commerce. HBC therefore meets the requirements for jurisdiction under the Sherman Act as measured by the "in commerce" test.

III. Dismissal of HBC's Complaint on the Pleadings Was Inappropriate.

Without any discovery and without the submission of any evidence, the District Court below dismissed HBC's Complaint either for want of jurisdiction or for failure to state a claim on which relief can be granted. HBC has consistently argued that resolution of the question of the necessary nexus with interstate commerce by summary proceedings is inappropriate. This objection was first raised in HBC's Brief in Opposition to Defendants' Motions to Dismiss for Lack of Jurisdiction. (App. 41). HBC has not had the benefit of any discovery procedures in order for it to present all the available evidence concerning the interstate commerce issues.

It is not clear in the order of the District Court (App. 46) whether HBC's Complaint was dismissed on the pleadings for failure to state a claim or for want of jurisdiction.[41] The majority below held, however, that the Complaint was properly dismissed for failure to state a claim upon which relief can be granted. (App. 54). In so holding, the majority below is in conflict with governing decisions of this Court. *See Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 203 fn. 19 (1974); *United States v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954); *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); 5 J. Moore, Federal Practice ¶ 38.36 [2.-2], p. 299 (2d ed. 1974). The question of the required nexus with interstate commerce under the Sherman Act is a question of subject matter jurisdiction, and frequently the resolution of that question is identical with the resolution of certain issues on the merits (particularly the issue of substantial effect on interstate commerce). As noted by Justice Douglas dissenting in *Copp Paving Company, Inc.* "if the jurisdictional issue is closely intertwined with or dependent on the

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[41] The Raleigh Group's motions to dismiss raised both these grounds. (App. 29, 31, 39).

merits of the case, the preferred procedure is to proceed to a determination of the case on the merits. *McBeath v. Inter-American Citizens for Decency Comm.*, 374 F. 2d 359, 362-363 (CA5), *cert. denied*, 389 U.S. 896 (1967); *Jaconski v. Avisun Corp.*, 359 F. 2d 931, 935-936 (CA3 1966)." (fn. 10 at page 213).

In certain limited situations, the issue of subject matter jurisdiction under the Sherman Act may be resolved by summary proceedings. Where the plaintiff or counterclaimant has not objected to such summary proceedings and has had an opportunity to present all available evidence concerning the interstate commerce issues, resolution of the jurisdictional dispute may, in the sound discretion of the District Court, be undertaken through summary procedures.[42] Nevertheless, the proper procedure to follow is a summary judgment procedure, not a dismissal on the pleadings alone.[43] The majority below made passing reference to the appropriateness of summary judgment procedure but failed to remand with instructions to follow that procedure:

> "Our task would be much simpler had the district court converted the motion to one for summary judgment as authorized by the last sentence of Rule 12(b). Such a course would doubtless have involved the district court and counsel in limited discovery procedures, but we think the extra time and effort would have been worthwhile." (App. 53-54).

Not only is such an approach "worthwhile," it is required.[44]

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[42] *Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 203 fn. 19 (1974).

[43] *Ibid.*

[44] It will be little comfort to victims of anticompetitive conspiracies to note that the majority below termed its sanctioning of this departure from appropriate procedure "a rare exception to prove the rule that judgments of dismissal on the pleadings in antitrust cases will ordinarily be dismissed." (App. 54).

As Judge Winter noted in dissent below:

> "In my view, this amended complaint may not be dismissed *on the pleadings*. Of course, I express no view as to whether the jurisdictional allegations can be proved, but plaintiff should be afforded the opportunity to establish them, if not at trial, at least by a *prima facie* showing to defeat any motion by defendants for summary judgment." (Emphasis in original) (App. 65).

The decision of the majority below affirming a dismissal of HBC's Complaint on the pleadings over HBC's objection and without affording any opportunity for discovery to ascertain all available evidence on the interstate commerce issues is unwarranted and seriously weakens the effectiveness of the private action under Section 4 of the Clayton Act as a means of enforcing the antitrust policy of the United States.[45] Such a departure from appropriate procedure should not be sanctioned by this Court.

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[45] This Court has frequently recognized the vital role played by such private actions in enforcing the antitrust laws. *Perma-Life Mufflers v. International Parts Corp.*, 392 U.S. 134 (1968); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947).

CONCLUSION

The decision of the majority below should be reversed, and this action should be remanded for trial on the merits.

Respectfully submitted

JOHN K. TRAIN, III

TIMOTHY S. PERRY

ROBERT W. MILLER
1200 C&S National Bank Building
Atlanta, Georgia 30303

JOHN R. JORDAN, JR.
1414 Branch Banking & Trust
Company Building
Raleigh, North Carolina 27602

November 19, 1975

APPENDIX

APPENDIX A TO BRIEF FOR PETITIONER

United States District Court
Southern District of New York

United States of America,
Plaintiff,
v.
The American Society of Anesthesiologists, Inc.,
Defendant.
Civil No. 75-4640

Filed: September 22, 1975

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendant and complains and alleges as follows:

I

Jurisdiction and Venue

1. This complaint is filed under Section 4 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 4), commonly known as the Sherman Act, in order to prevent and restrain the continuing violation by the defendant, as hereinafter alleged, of Section 1 of said Act (15 U.S.C. § 1).

2. The defendant is found within the Southern District of New York.

II

Defendant

3. The American Society of Anesthesiologists, Inc., (hereinafter referred to as "ASA") is made the defendant herein. ASA is a corporation organized and existing under the laws of the State of New York, with its principal place of business in Park Ridge, Illinois. ASA is an association of physicians engaged in the business of providing anesthesia services to the public. Such persons become members of the ASA by joining component societies which are active in 48 states, the District of Columbia and the Commonwealth of Puerto Rico. The component societies control the ASA through the election of delegates and directors who govern ASA and determine its policies.

III

Co-Conspirators

4. Various other persons, firms, organizations and corporations not made defendants herein, participated as co-conspirators in the violation hereinafter alleged and performed acts and made statements in furtherance thereof. Such co-conspirators include, among others, component societies and members of ASA.

IV

Trade and Commerce

5. Anesthesiologists are licensed physicians who specialize in inducing a state of anesthesia, usually in connection with the performance of surgery in a hospital. There are approximately 12,200 anesthesiologists in the United States, over 90 percent of whom are members of ASA. Anesthesiologists are generally

engaged in the private practice of medicine, deriving their income from fees charged directly to the patient. Members of ASA realize annual revenues in excess of $675 million.

6. A substantial portion of the fees charged patients by members of ASA are paid directly or indirectly by health insurance carriers. The fees charged by members of ASA for their services have a direct and substantial effect upon the payments made and upon the premiums charged by health insurance carriers. The businesses which provide health insurance operate in interstate commerce and there is a substantial movement of monies in interstate commerce pursuant to the terms of health insurance policies.

7. Pursuant to the "Health Insurance for the Aged Act," 42 U.S.C. § 1395, commonly referred to as the "Medicare" program, substantial payments are made by the United States Treasury across state lines through insurance carriers acting as intermediaries, to anesthesiologists located throughout the United States.

8. Pursuant to the "Grants to States for Medical Assistance Programs," 42 U.S.C. § 1396, commonly referred to as the "Medicaid" program, substantial payments are made to anesthesiologists located throughout the United States by state governments from funds received across state lines from the United States Treasury.

9. Substantial quantities of drugs and equipment ultilized by anesthesiologists in providing their services are regularly sold and shipped to hospitals in a continuous and uninterrupted flow of interstate commerce by manufacturers and suppliers located in various states, including states other than those in which such drugs and equipment are utilized.

V

Violation Alleged

10. For many years up to and including the date of the filing of this complaint, the defendant and co-conspirators have been engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act. Said violation is continuing and will continue unless the relief hereinafter prayed for is granted.

11. The unlawful combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendant and co-conspirators to raise, fix, stabilize, and maintain fees charged by members of the defendant for rendering anesthesia services.

12. In furtherance of and in effectuating the aforesaid combination and conspiracy the defendant and co-conspirators have done the things which, as hereinbefore alleged, they agreed and conspired to do, including, among other things, adopting, publishing and circulating relative value guides or schedules which are used by members of ASA in determining fees charged for anesthesia services and which assign specific values to particular procedures.

VI

Effects

13. The aforesaid combination and conspiracy has had the following effects, among others:

(a) fees for the sale of anesthesia services by members of the ASA have been raised, fixed, stabilized, and maintained at artificial and noncompetitive levels;

(b) price competition in the provision of anesthesia services by the members of the ASA has been restrained; and

(c) purchasers of anesthesia services have been denied the right to obtain such services at competitively determined fees.

Prayer

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that the defendant and co-conspirators have engaged in an unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in violation of Section 1 of the Sherman Act.

2. That the defendant, its officers, directors and agents, and all other persons acting or claiming to act on its behalf, be enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining, or renewing the combination and conspiracy hereinbefore alleged, or from engaging in any other combination, conspiracy, contract, agreement, understanding or concert of action having a similar purpose or effect, and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

3. That the defendant, its officers, directors and agents, and all other persons acting or claiming to act on its behalf, be enjoined and restrained from promulgating, adopting or disseminating any guide or schedule concerning fees or from making any recommendations regarding the calculation of fees to be charged by members.

4. That the plaintiff have such other, further, general and different relief as the case may require and the Court may deem just and proper under the circumstances.

5. That the plaintiff recover its taxable costs.

JOHN SIRIGNANO, JR.
ELLEN R. AGRESS
EDWIN WEISS
ERWIN L. ATKINS
Attorneys,
Department of Justice
Antitrust Division
Room 3630
26 Federal Plaza
New York, New York 10007

/s/ THOMAS E. KAUPER
Assistant Attorney General

/s/ BADDIA J. RASHID

/s/ WILLIAM E. SWOPE
BERNARD WEHRMANN
Attorneys,
Department of Justice